(2)

Supreme Court, U.S.
FILED
MAR 16 2004
OFFICE OF THE CLERK

No. 03-1177

In The

Supreme Court Of The United States

EDWARD A. AND DORIS ZELINSKY,
Petitioners,

v.

TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF OF RICHARD BLUMENTHAL, ATTORNEY GENERAL OF THE STATE OF CONNECTICUT AS AMICUS CURIAE IN SUPPORT OF PETITIONER

RICHARD BLUMENTHAL
ATTORNEY GENERAL
OF CONNECTICUT

* MARK F. KOHLER
Assistant Attorney General
Office of the Attorney General
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120
(860) 808-5270

**Counsel of Record*

Printed by

Brescia's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
528-4254

QUESTIONS PRESENTED

(1) On days when New York's "convenience of the employer" rule risks double taxation of nonresident telecommuters for working at their out-of-state homes, does that rule, and the risk of double taxation the rule causes, violate the Commerce Clause?

(2) On days when New York's "convenience of the employer" rule risks double taxation of nonresident telecommuters for working at their out-of-state homes, does that rule, and the risk of double taxation the rule causes, violate the Due Process Clause?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTERESTS OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 2

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES:

Allied-Signal, Inc. v. Director, Division of Taxation, 504 U.S. 768 (1992) 4

Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653 (1948) 5

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) 4

Lunding v. New York Tax Appeals Tribunal, 522 U.S. 287 (1998) 5

New York ex rel. Cohn v. Graves, 300 U.S. 308 (1937) 3

Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995) 4

Shafer v. Carter, 252 U.S. 37 (1920) 3

Zelinsky v. Tax Appeals Tribunal, 1 N.Y.3d 85, 801 N.E.2d 840, 769 N.Y.S.2d 446 (2003) 4

STATUTES AND REGULATIONS:

Conn. Gen. Stat. §§ 12-700 to 12-701 (2003) 4

Conn. Gen. Stat. § 12-704(a)(1) (2003) 3, 4

20 N.Y. Comp. Codes R. & Regs. § 132.18(a)..... 3

N.Y. Tax Law § 631(a)(1) 3

OTHER AUTHORITIES

2 J. Hellerstein & W. Hellerstein, STATE TAXATION ¶ 20.05[4][c] (3d ed. 2002)..... 5, 6

INTERESTS OF THE AMICUS CURIAE

The petitioner is representative of a growing part of our economy – persons who, because of the advances in technology, are able to work at home for all or part of a work week. Located adjacent to New York City, Connecticut is particularly effected by this trend. A large number of Connecticut residents commute every day to New York to work. An increasing number of those Connecticut residents take advantage of the opportunities and benefits of so-called "telecommuting." However, those who do are unfairly and unconstitutionally penalized by New York's use of the "convenience-of-the-employer" rule of income allocation for state income tax purposes.

The New York Court of Appeals attempts to lay this problem at Connecticut's door, asserting that the risk of double taxation of telecommuting Connecticut residents is the result of Connecticut's, not New York's, tax system. However, New York's efforts to sustain its system of double taxation of nonresidents and to deflect responsibility for this unconstitutional double taxation finds no support in this Court's longstanding principles on the limits of state taxation under the Commerce Clause and the Due Process Clause. Unless this Court takes up this matter, Connecticut's telecommuting residents will continue to be subject to New York's unconstitutional double taxation.

SUMMARY OF ARGUMENT

New York's insistence on using the fiction of the convenience-of-the-employer rule for apportioning a nonresident's income violates the constitutional limits on the extraterritorial reach of a state's taxing authority. Thousands of Connecticut telecommuting residents are burdened with the double taxation that is the result of New York's unconstitutional method of apportionment of their income. This petition provides the ideal opportunity for this Court to reaffirm those limits and to end unconstitutional burdens imposed by New York's apportionment methodology.

ARGUMENT

The petitioner is part of a growing and important part of the nation's contemporary workforce. Taking advantage of advances in information and telecommunications technology, he is able to spend part of his work week at a home office rather than commuting to his employer's place of business. He does so admittedly for his own convenience and not because his employer requires it. Like the thousands of other Connecticut residents who "telecommute," the petitioner benefits from this technologically driven opportunity. There can also be definite benefits to employers, in terms of improved morale and productivity, and to society, from a reduction in the deleterious impacts of traditional commuting. In general, telecommuting ought to be encouraged.

The State of New York, however, has a tax structure that burdens out-of-state telecommuters with double taxation. New York treats the portion of a nonresident's income that was earned while working outside of New York as having been earned within New

York unless the nonresident telecommuter was working out-of-state for his employer's convenience. Rather than apportion a nonresident's income on the basis of the portion of the time spent outside the state, New York sees fit to tax all of the nonresident's income. This so-called "convenience-of-the-employer" rule has the direct effect of imposing double taxation on thousands of Connecticut's telecommuting residents for that portion of their work week that is spent in Connecticut.

A state may tax the worldwide income of its residents; as to nonresidents, however, it may only tax the income derived from sources within the state. *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 312 (1937); *Shafer v. Carter*, 252 U.S. 37, 57 (1920). New York purports to tax the income of nonresidents that is "derived from or connected with New York sources. . . ." N.Y. Tax Law § 631(a)(1). As a general rule, when a nonresident partly works outside of New York, only that portion of his income that is attributable to the part of the work week spent working in New York is deemed income derived from New York sources. 20 N.Y. Comp. Codes R. & Regs. § 132.18(a) (Pet. App. 85). However, this apportionment is available under New York's tax laws only to the extent that "the performance of services which of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of the employer." *Id.* Thus, unless the employer requires, rather than permits, the employee to work out-of-state, the nonresident employee's income will be treated as New York income.

As is typical of states that have a personal income tax, Connecticut taxes the worldwide income of its residents. Conn. Gen. Stat. §§ 12-700 to 12-701 (2003). Connecticut allows a credit for taxes paid to another state for income derived from sources in that state. Conn. Gen.

Stat. § 12-704(a)(1) (2003). It does not allow a credit for taxes paid on income earned in Connecticut.

The result of New York's convenience-of-the-employer rule is that a Connecticut resident that works part of the time in New York and part of the time in Connecticut, but not at the demand of this employer, is taxed by both New York and Connecticut for that portion of his income earned while in Connecticut. The cause of this double taxation is not, as the court below opined, because Connecticut does not provide a credit all the income tax paid to New York. *See Zelinsky v. Tax Appeals Tribunal*, 1 N.Y.3d 85, 96, 801 N.E.2d 840, 769 N.Y.S.2d 446 (2003) (Pet. App. 12). It is the direct result of New York's convenience-of-the-employer fiction, which treats income earned while working in Connecticut as income earned in New York simply because the nonresident employee is not required by his employer to work in Connecticut.

As demonstrated fully in the petitioner's brief, New York's convenience-of-the-employer rule runs afoul of this Court's precedent under both the Commerce Clause and the Due Process Clause. Under the Commerce Clause, a state's income tax must be fairly apportioned on the basis of the income that can be attributed to activity within the state. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 190 (1995); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). Similarly, the Due Process Clause prohibits states from extending its taxing authority to value earned outside its borders. *Allied-Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768, 782 (1992).

New York's convenience-of-the-employer rule violates both of these constitutional limits on its taxing authority over nonresidents. It deems income earned out-of-state to have been earned in New York solely on the

ground that the employer did not require the nonresident employee to perform the work outside of New York. This fictional treatment of the location in which the income is earned, in stark contrast to reality, is not a fair basis for apportionment of the nonresident's income. *See Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 660 (1948) (deeming transportation that passes through other states as commerce confined only to taxing state is "pure fiction" and is not a fair basis for apportionment of tax). Instead, it is little more than an unconstitutional attempt to extend the reach of its taxing authority extraterritorially.

Moreover, New York's unconstitutional apportionment rule cannot be made valid on the specious assertion that Connecticut, by not providing for a credit for any income tax paid to another state, has created the problem of double taxation. As this Court has made clear, it does not matter, for purposes of judging New York's tax laws under the requirements of the Commerce Clause and the Due Process Clause, what Connecticut's tax laws provide. The constitutionality of one state's taxation of nonresidents does not "'depend upon the present configuration of the statutes of another State.'" *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 314 (1998) (quoting *Austin v. New Hampshire*, 420 U.S. 656, 668 (1975)).

New York's convenience-of-the-employer rule has been justly criticized. A leading treatise concludes that the convenience-of-the-employer rule is not "an acceptable constitutional test for attributing an employee's compensation to a state for income tax purposes. . . ." 2 J. Hellerstein & W. Hellerstein, STATE TAXATION ¶ 20.05[4][c] (3d ed. 2002). It explains that:

> The crucial weakness in the convenience rule lies in the fact that it is not based on the

> benefits or protection state grants to the employer or the business, or the social costs the state incurs on their behalf. Such factors are likely to be identical whether the employee performs his services at home or on vacation, because of his own or his employer's convenience.

Id.

Thousands of Connecticut residents who wish to take advantage of the benefits of telecommuting are burdened with the double taxation that is the result of New York's unconstitutional method of apportionment of their income. This case presents the proper occasion for the Court to end New York's unfair taxation of nonresidents.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

RICHARD BLUMENTHAL
ATTORNEY GENERAL
OF CONNECTICUT

* Mark F. Kohler
Assistant Attorney General
Office of the Attorney General
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
(860) 808-5270

* Counsel of Record